

TECK YOW BROTHERS HAND-BAG TRADING CO.

v.

MAHARANI SUPERMARKET SDN. BHD.

HIGH COURT MALAYA, JOHOR BAHRU

ABU MANSOR ALI J

[COMPANIES WINDING-UP NO. 42-23 OF 1987]

15 AUGUST 1988

COMPANY LAW: *Winding-up petition - Objection by creditor - Company not able to pay debts - Failure to send statutory notice not fatal - Just and equitable to wind-up - Companies Act, ss. 218(1), (2), 219, 221, 224 - Companies Winding-Up-Rules, r. 24A.*

The petition to wind-up the respondent was opposed by a creditor who was the landlord of the respondent. The petitioner was also a creditor. The creditor who had opposed the petition had levied distress proceedings after the petition was presented. The issues were whether the creditor who had opposed the petition had *locus standi*, whether the failure to send the statutory notice was fatal and whether it was just and equitable to wind-up the respondent.

Held:

[1] The creditor who objected to the petition had *locus standi* to object. He had an interest in the proceedings as the sum which was realised in the distress proceedings was not sufficient to pay the arrears of rent which were due.

[2] The failure to send the statutory notice to the respondent pursuant to s. 218(2)(a), Companies Act was not fatal in these circumstances as the petitioner was also relying on ss. 218(2)(b) and (c) of the said Act.

[3] It was just and equitable to wind-up the respondent as the proceeds which were realised from the distress proceedings was not sufficient to pay all the creditors. The contingent and prospective liabilities of the respondent were considered.

[Petition allowed. Costs to be taxed.]

Cases referred to:

Re Welsh Brick Industries Ltd. [1946] 2 All ER 197

Re NKM Holdings Sdn. Bhd. [1985] 2 MLJ 392

Legislation referred to:

Companies Act 1965, ss. 218(1)(e), (i), (2)(a), (b), (c)

Companies (Winding-Up) Rules 1972, r. 24(a)

For the petitioner - Ong Ban Chai; M/s. Ong Ban Chai & Co.

For the provisional liquidator - T.S. Chong; M/s. Varughese & Co.

For the opposing creditor - R.A. Kumar; M/s. Varughese & Co.

JUDGMENT

Abu Mansor Ali J :

This petition for winding up came up for hearing on 19 July 1988 and at the end of argument I reserved judgment to 15 August 1988. My judgment is as follows.

Teck Yow Brothers Hand-bag Trading Company (Teck Yow), petitioner, is applying to wind up Maharani Supermarket Sdn. Bhd. (Maharani). Ban Heng Hong Sdn. Bhd., a creditor of Maharani, objects to the application for winding up.

- a** Maharani was incorporated on 24 January 1978 with an authorised capital of RM1,500,000 divided into 1,500,000 shares of one dollar share each. The amount of paid up capital of the company is RM793,203. Apart from the other objects set out in the Maharani's memorandum and articles of association its objects are to carry on the business of general merchants of all kinds from preserved provisions to all goods or articles of every description which may seem to Maharani capable of being conveniently carried on to enhance the value or render
- b** profitable any of the Maharani's property or rights. It was by virtue of the purchase price of goods sold and delivered to Maharani that the petitioner herein alleged that Maharani is indebted to the petitioner for RM4,093. The petitioner further alleged that the company is unable to pay its debt and in the circumstances, the petitioner says it is just and equitable that the company be wound-up. Hence petitioner Teck Yow prays for an order that the company be wound-up, that the official receiver (at the hearing amended to M/s. Roland
- c** Chung) be appointed the provisional liquidator of Maharani and also prays for the usual further consequential orders.

- The petitioner's application was supported by the affidavit of petitioner's solicitor Mr. Ong Ban Chai who affirmed that the petition had been duly advertised by insertion of such advertisement (OBCL) once in the New Straits Times 16 May 1987 and once again Sin Chew Jit Poh on 18 May 1987. Mr. Kumar for the opposing creditor Ban Heng Hong, however,
- d** disputed that the advertisement is good advertisement. The petition has also been duly gazetted on 9 April 1987.

- At the outset of the hearing Mr. Ong Ban Chai for the petitioner raised a preliminary point. He contended that creditor Ban Heng Hong had no *locus standi*. Petitioner's Counsel contended that creditor Ban Heng Hong is not a mere creditor but one by virtue of being a
- e** landlord of Maharani who had carried out distress on the property of Maharani on 17 March 1987 after the present petitioner presented their petition on 5 March 1987. Counsel further contended that if the petitioner is successful in his application for a winding-up the position under s. 219 of the Companies Act is that the Maharani winding-up commences on the date of the presentation of the petition. He submitted under s. 224 of the Companies Act, therefore, any attachment after the commences of the winding-up by the Court shall be void. Hence he
- f** says creditor Ban Heng Hong has no *locus standi* to oppose this present petition.

- Mr. Kumar, however, submitted that he has *locus standi*. He conceded that if the winding-up is successful then no distress could be effected by his client since the distress was after the commencement. However, if on the other hand, the winding-up is bad, and he intends to submit it is so, then his distress is valid. As a matter of fact the distress that was carried out realised RM61,000. That amount is deposited with the High Court Registry in Muar. What
- g** is due to his client is some RM45,000. If the winding-up is held to be invalid by the Court his client would have priority. In either case Mr. Kumar's client has got definite interest in the outcome or the decision of the Court in the matter of Maharani's winding-up. I rule that Mr. Kumar's client has interest on the subject matter of the winding-up and in my view he has *locus standi*.

- h** On the petition for winding-up, Mr. Ong Ban Chai, anticipated and answered the point raised by the managing director of Ban Heng Hong, Mr. Chua Su Yin in clause 7 of his affidavit affirmed on 9 June 1987 that the petitioner failed to serve the statutory notice under s. 218(2)(a) of the Companies Act 1965 prior to the presentation of the petition and failed to prove that the Maharani was unable to pay its debt at the time of the presentation of the petition. In answer, petitioner's Counsel says even assuming that there is non compliances
- i** with the required notice it can be covered by s. 221 of the Companies Act by the Court

dispensing with such a notice. Under s. 218(2) of the Act since the petitioner is proceeding under s. 218(1)(e) and (i) and s. 218(2)(b) and (c) relying on evidence that the company is unable to pay its debt there is therefore no need for the petitioner to issue the statutory notice as the petitioner is not relying on that presumption. The evidence that Maharani is unable to pay its debts are all there. There is a list of supporting creditors filed. A provisional liquidator had already been appointed on 16 April 1987 and the goods of Maharani seized had all been sold in March 1987. **a**

Petitioner's Counsel therefore submitted that there are only two issues before the Court. One was whether there was a *bona fide* dispute as to the existence of the debt and secondly is Maharani able to pay its debt. If the answer in both cases are in the negative then the company should be wound-up. If the Court is inclined to give the order, Counsel applied that Roland Chung be appointed as the liquidator. Counsel cited *Re Welsh Brick Industries Ltd.* [1946] 2 All ER 197. **b**

Mr. Kumar for Ban Heng Hong founded his objections to the winding-up on two grounds one of which was whether the petitioner had satisfied the Court that Maharani was unable to pay its debt. He contended that a company is unable to pay its debt when a notice had been sent to it giving it 21 days to pay its debt. Since the petitioner did not avail himself of s. 218(2)(a) there was therefore no evidence that Maharani was unable to pay its debt. According to Mr. Kumar it was important to remember that there was execution and Maharani was able to pay its debt. He contended that is was at the time of the filing of the petition that it must be shown that Maharani was unable to pay its debt. As to the requirement that the Court must look into the contingent and prospective liabilities of the company Maharani in order to be satisfied that it was unable to pay its debt, he submitted there is no such evidence. He also submitted there is also absence of ground for winding-up Maharani on the just and equitable grounds. Since the petitioner is unable, so Mr. Kumar contends, to prove that Maharani is unable to pay its debt, the Court could in no way remedy the situation and dispense with the s. 218 notice. **c**

Mr. Kumar's other ground is that the winding-up order should not be granted as the petitioner had failed to comply with r. 24(a) of the Winding-Up Rules requiring publication twice at least in two local newspaper. He submitted that this is also made the petition bad and therefore ought to be dismissed. **d**

After hearing arguments I came to the conclusion on the facts before me that the sole issue is whether Maharani is unable to pay its debt and therefore should be wound-up. On such examination of the facts the evidence is overwhelming that the respondent Maharani is unable to pay its debt. I find as a fact that the petitioner has proved to my satisfaction that Maharani was unable to pay its debt and in so determining I am allowed to do so by taking into account the contingent and prospective liabilities of the company Maharani. As has rightly been pointed to by the petitioner's Counsel as per encl. (63) Maharani's debt according to the list of supporting creditors amount to RM100,000. To this must be added the amount he owed the opposing creditor his landlord to RM40,000. The distress realised only RM61,000. Because of this amount it has never been really disputed by the opposing creditor that Maharani is insolvent but what the objection consists of is that there was sufficient to pay Ban Heng Hong and by that yardstick Maharani is able to pay its debt and we shut our eyes to the other creditors in the list. To take that view is in my view unreasonable and unjust. **e**

As for the contention that no proper notice under s. 218(2)(a) of the Act has been given I find in this case that the notice is in the circumstances unnecessary and I order that it be dispensed with as the petition is not wholly founded under s. 218(2)(a) of the Companies **f**

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a act. I am of the view that s. 218(2)(a)(b) and (c) are mutually exclusive and on the facts and in the exercise of its discretion a company can be wound up by the Court on any of the grounds (a), (b) or (c).

b As regards the allegation that the petitioner failed to comply with r. 24 of the Winding-up Rules as to publication in the gazette and 2 local newspapers, I find the petitioner have published in the gazette and once in two local newspapers and this was sufficient publication applying the case of *Re NKM Holdings Sdn. Bhd.* [1985] 2 MLJ 392 (*supra*).

c With all the objections disposed of and my finding that Maharani is unable me to exercise my discretion to order winding-up of Maharani. Apart from this consideration there was also the statement from the Bar of the petitioner's Counsel that the directors of Maharani have already absconded. I accept that statement. As Maharani is without its directors to act for them and that a provisional liquidator had already been appointed and my finding that it is unable to pay its debt on that ground it is just and equitable that Maharani be wound-up. I do make that order and consequentially order that M/s. Roland Chung be and is hereby made liquidator of Maharani with reasonable costs to petitioner and the other supporting creditors to be taxed.

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Also found at [1989] 1 CLJ 258

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